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IN THE

Supreme Court of the United States

October Term, 1966

No. 296

C. PARKE MASTERSON and JOSEPH LAVORATA,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITIONERS' REPLY BRIEF

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Preliminary Statement

The Government opposes the petition for a writ of certiorari upon hyper-technical grounds by contending that the decision appealed from is interlocutory and as such is not appealable under the authority of *DiBella* v. *United States*, 369 U. S. 121 (1962) and *Cogen* v. *United States*, 278 U. S. 221. However the order sought to be reviewed is appealable because special circumstances exist involving a question of constitutional law not heretofore passed upon by this Court, and because it is final in many respects. Also, review of this order will serve the cause of practicability and advance the cause of justice.

POINT I

Special circumstances exist sufficient to impel the hearing of this appeal.

Where special circumstances exist an appeal may be heard even though the order appealed from may not be final within 28 U. S. C. A. 1291.

United States v. *Wood*, 5th Cir., 295 F. 2d 772 (1961);

Boston Store of Chicago v. *Newberry*, 83 F. Supp. 442 (1948).

Because the facts underlying this order are uncontroverted and its review will be concerned exclusively with a question of law not previously passed upon by this Court, special circumstances exist warranting review now of the order in question. Until these novel legal issues raised by this petition are resolved petitioners should not be compelled to stand trial. This is especially so since a trial, in the ultimate, may prove to be needless, or, to say the least, a needless ordeal.

More than ample authority exists to support the hearing of appeals from interlocutory orders. (See *United States* v. *Wood, supra.*) There the Court of Appeals for the Fifth Circuit denied a motion to dismiss an appeal by the Government from an order denying it a temporary restraining order. At the outset, appellees there moved, as the Government moved here, to dismiss the appeal upon the grounds that the order appealed from was interlocutory and non-appealable. The Fifth Circuit denied the

motion to dismiss holding, in substance, that the practical effect of denying the temporary restraining order was to render the appeal and the action moot. For the reasons expressed in *United States* v. *Wood, supra,* the Court of Appeals for the Second Circuit erred when it dismissed the instant appeal. By dismissing the appeal the Second Circuit rendered petitioners' appeal and the constitutional issue involved therein moot and relegated them to trial upon an indictment rooted in illegal evidence barred by the Fourth Amendment. Furthermore, the admission of this illegally seized evidence could not be barred upon the trial since the District Court denied petitioners' motion to suppress. Without a decision by this Court upon this vitally important but unsettled legal issue petitioners are confronted with a prosecution during the record and then only if a judgment of conviction followed petitioners, in appealing could raise this issue. This course is not only impractical but also renders petitioners' right to appeal moot. No good reason, statutory or otherwise, should bar petitioner from now seeking and having review of the constitutionality and admissibility of the evidence relied upon by the prosecution where the evidence sought to be excluded is patently unconstitutional and inadmissible. It is of little consolation to petitioners and meaningless to say to them that the dismissal of their appeal by the Court of Appeals and the denial by this Court of their petition for a writ of certiorari does not deny them their right to appeal these issues if they are set within the framework of a judgment of conviction while, in the interim, they have suffered the ordeal, pressure, shame and exposure of a public trial. Settled law and good sense impels the conclusion that this appeal should be heard now.

Petitioners are unquestionably entitled to effective review of these issues. Review is of no effect if available to petitioners only after they have lost the most. This will occur if it requires the completion of a trial before review takes place of a constitutional issue relating to a question of evidence. To avoid a result of this nature this Court in *Cohen* v. *Beneficial Industrial Loan Corporation et al.*, 1949, 337 U. S. 541 and *Sears, Roebuck & Co.* v. *Mackey*, 1956, 351 U. S. 427 in an opinion by Mr. Justice Frankfurter held as follows at page 441:

> "'Thus, the court has permitted appeal before the completion of the whole litigation when failure to do so would preclude any effective review or to result in irreparable injury.'"

Furthermore, Judge Rives in *Wood* v. *United States, supra*, held as follows:

> "On the basis of these cases, we feel that the Supreme Court has approved a practical construction of Section 1291 and that an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under Section 1291."

It is, therefore, firmly established that an interlocutory order, otherwise non-appealable, but which involves and determines substantial rights may be appealed immediately. For to delay review of such an order would inevitably result in the irreparable loss of those rights sought to be protected including the right to effective review.

If review is now denied and deferred until judgment petitioners must proceed to a trial which would be lengthy, intricate and complex. Its defense will involve extraordinary expenditures for representation by counsel, disbursements for a lengthy record, investigation and all other expenses usually attendant upon a trial. Because a trial may be needless, should this Court agree with petitioners, it becomes self-evident that compelling petitioners to proceed to trial without a decision of this Court determining whether the Government's illegally seized evidence is barred by the Fourth and Fifth Amendments, involves the loss of substantial rights and results in unnecessary circuitousness.

Thus, in *Mills* v. *Alabama*, — U. S. —, decided May 23, 1966, this Court denied a motion to dismiss an appeal upon the ground that the judgment was not final. In doing so Mr. Justice Black held as follows:

> "Thus, if the case goes back to the trial court, the trial, so far as the record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy

> in judicial systems already troubled by congested dockets * * *".

Implicit in this holding is a rejection of the unnecessary in favor of the necessary. A rejection of the unnecessary is the quintessence of the special circumstances warranting review now of these issues involved in this petition. This Court's reasoning in *Mills, supra,* has equal and forceful application here.

POINT II

The order to be reviewed insofar as it sustains an invasion of petitioners' privacy is final and therefore appealable.

An appeal is allowed from a determination by District Court which is fully dispositive of one aspect of the entire request for relief. Insofar as the order to be reviewed sustains an invasion of petitioners' privacy it is final and thus appealable.

> *Cohen* v. *Beneficial Industrial Loan Corp. et al.,* 337 U. S. 541;
> *Chabot* v. *National Securities and Research Corporation et al.,* 290 F. 2d 657, 2nd Cir. 1961.

In *Cohen* v. *Beneficial Industrial Loan Corp., supra,* an appeal was allowed from an order of the Court of Appeals reversing an order of the District Court denying an application for the posting of a bond in the amount of $125,000.00. This Court held the order appealable because "it is a final disposition of a claimed right which is not

an ingredient of the cause of action and does not require consideration with it * * *. Here it is the right to security that presents a serious and unsettled question." In reaching this conclusion the Court, at page 546 of its opinion, held as follows:

> "The effect of the statute (28 U. S. C. A. 1291 and 1292) is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by an appeal. But the District Court's action upon this application was concluded and closed and its decision is final in that sense before the appeal was taken * * * the decision appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated. The court has long given this provision of the statute this practical rather than technical construction."

Since the order below is within "* * * that small class which finally determine claims of right separable from and collateral to, rights asserted in the action * * *" and "* * * too important to be denied review * * *" *Cohen* v. *Beneficial Loan Corp., supra,* is controlling here. Giving, as the Supreme Court held, a "practical" construction to Sections 1291 and 1292 impels consideration now of this appeal and the important questions which it raises.

This is so since, the thrust of the Fourth Amendment is to protect the right of privacy. By denying the motion to suppress the District Court, in effect, sustained an invasion of petitioners' right of privacy. The denial of these fundamental rights are, in the words of the Supreme Court, "too important to be denied review."

One further aspect clothes the order appealed from with finality. That is the District Court's denial of petitioners' motion to suppress this evidence. This order is final in the sense that the trial court, being a court of concurrent jurisdiction, is bound to follow the District Court's order and admit in evidence the matter which was illegally seized. For this reason the order is final and may be heard.

POINT III

Appeals from interlocutory orders in criminal cases are permitted—*DiBella* v. *United States* notwithstanding.

The rule against appeals from interlocutory orders in criminal cases is not absolute or inflexible. Much prior authority exists for appeals from interlocutory orders in criminal cases.

Not only is *DiBella* v. *United States, supra,* inapposite but assuming, *arguendo,* that it has application here there is much within that decision to authorize appeals from interlocutory orders in criminal cases of this kind. Reference therein at page 125 to *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541 indicates that the rule against appeals from interlocutory orders in criminal cases is not ironclad.

There the Supreme Court held that "* * * so as not to frustrate the right of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not 'affect, or * * * be affected by, decision on the merits of [the] * * * case' * * * when the practical effect of the order will be irreparable by any subsequent appeal."

This certainly is a re-affirmation of the Court's prior holding in the *Cohen* case, *supra,* wherein the Supreme Court held that it "* * * has long given this provision of the statutes this practical rather than technical construction." This language clearly demonstrates that the rule against appeals from interlocutory orders is not unyielding.

At page 129 of *DiBella, supra,* Mr. Justice Frankfurter holds as follows:

> "Furthermore, as cases in the Second Circuit make clear, appellate intervention makes for truncated presentation of the issue of admissibility, because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light * * *".

However, unlike *DiBella, supra,* no factual issues are involved in this appeal. No necessity existed in this case for the Court below to inquire into and resolve factual questions since the facts of the seizure were not in contest. The Government, in the Court below, did not dispute the facts but took the position that it, as the prosecuting arm, was not bound by the acts of a trustee in bankruptcy.

Since only issues of law are to be presented to this Court by this petition no necessity exists for this Court to intercede itself into and evaluate questions of fact. As this petition presents purely legal issues *DiBella, supra,* should not be considered as a bar.

Although *DiBella, supra,* deals exclusively with pre-trial motions to suppress and is without application here, other cases have been decided by the Supreme Court with respect to post-indictment motions to suppress. These decisions hold that the rule against interlocutory appeals in criminal cases is indeed malleable.

> *Carroll* v. *United States,* 354 U. S. 394 (1957);
> *Cogen* v. *United States,* 278 U. S. 221 (1929).

In *Carroll* v. *United States, supra,* Mr. Chief Justice Warren at page 403 of the opinion held as follows:

> "It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus appealable without regard to the limitations of 28 U. S. C. §1291 • • •."

Although the exception to the rule against appeals in criminal cases was held by Mr. Chief Justice Warren to be few the significance of the opinion is its holding that an exception to the rule exists. This exception justifies review by this Court of the order in question since it falls within that exception.

In *Cogen* v. *United States*, *supra*, Mr. Justice Brandeis' opinion also contains language demonstrating that the rule against appeals from interlocutory order and criminal cases is not inflexible. There, at page 226 of the opinion Mr. Justice Brandeis held as follows:

> "And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court."

This, of course, constitutes an expression of authority that appeals may be taken from interlocutory orders where its 'independent character" is clear. Certainly the constitutional issue involved in the seizure to be considered here, the infringement and deprecation of fundamental constitutional rights, and the absence of factual questions characterizes the order appealed from as having the degree of independence from the criminal proceeding so as to place it in the category of those orders which may be appealed although interlocutory.

The invasion of petitioners' rights will be further compounded if they are now compelled to stand trial during which the illegally seized evidence will be presented to the Court and jury against them. Only the intercession of this Court at this time to hear this appeal will prevent the utter fragmentation of these rights. Certainly where these issues are presented for the first time within this context of uncontroverted facts and an adjudication that the seizor of the evidence was guilty of wrong doing independent from the criminal proceeding exist justifying the hearing of this appeal now.

POINT IV

Petitioners' filing of their petition for a writ of certiorari was timely.

Filing the petition for a writ of certiorari was timely and not out of time as contended by the Government in its memorandum in opposition. The Government relies upon Rule 22-2 of the Rules of this Court in support of its contention of non-timeliness. Rule 22-2 requires the filing of a petition for a writ of certiorari in a criminal case within 30 days "after the entry of such judgment." Inasmuch as Rule 22-2 applies to "judgments" rather than "orders" it has no application here. This is so since petition for a writ of certiorari seeks review of an "order." This is confirmed by the first sentence of the Government's memorandum in opposition which states "petitioners seek review of the order of the Court of Appeals for the Second Circuit, entered May 9, 1966 * * *." It is entirely apparent that Rule 22-2 of the Rules of this Court has no application to the instant petition for a writ of certiorari.

POINT V

This Court has jurisdiction to entertain the petition for a writ of certiorari.

Upon the authority of *Cogen* v. *United States,* 278 U. S. 221 and *DiBella* v. *United States,* 369 U. S. 121 the Government opposes the instant petition for a writ of certiorari contending that the order appealed from is not appealable. However, these authorities have no application here since they are concerned with the construction of 28

U. S. C. A. 1291 which defines the jurisdiction of the Court of Appeals. However any jurisdictional issue must relate to the jurisdiction of this Court to review the order in question. Consequently the applicability of 28 U. S. C. A. 1291 is not in issue but rather the statutory jurisdiction of this Court.

This Court has jurisdiction to review this order under 28 U. S. C. A. 1254 (1). In this respect Section 1254 subdivision (1) reads as follows:

> "§1254. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any part of any civil or criminal case, before or after rendition of judgment or decree."

This statute makes self-evident the powers of this Court to entertain the instant petition for a writ of certiorari since any civil or criminal case may be reviewed before or after judgment or decree. Since the case at bar is a criminal prosecution and the petition seeks review of an order rendered before judgment or decree this Court possesses jurisdiction to entertain the petition for a writ of certiorari.

CONCLUSION

By reason of all of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

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